DATE: May 7, 1998
CASE NO.: 96-INA-00243

In the Matter of:

SANTA FE CONVALESCENT HOSPITAL
Employer

On Behalf Of:

JUANA E. PARAYNO
Alien

Appearance: Jack Golan, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 1, 1994, Santa Fe Convalescent Hospital ("Employer") filed an application for labor certification to enable Juana Elena Parayno ("Alien") to fill the position of Licensed Vocational Nurse ("L.V.N.") (AF 33). The job duties for the position are:

> Provide Nursing Care to patients of Convalescent Hospital facility. Follow established performance standards, policies & procedures on assigned unit; provide oncoming charge nurse with concise report and take follow-up actions as needed; conduct daily patient rounds and report problem areas to supervisory personnel; prepare admission, discharge & transfer documents of patients; complete charting of new patients; count narcotics each shift; pour, pass & chart medications at appropriate times; respond to patient needs & provide assistance in bathing, feeding, dressing, walking, medication intake, etc.; document care provided and patients response or lack of response to treatment provided consistently, accurately & on a timely basis; do weekly summary of all treatments with copy to DNS.

The requirements for the position are two years experience in the job offered. Other Special Requirements are must have a valid California L.V.N. License.

The CO issued a Notice of Findings on June 26, 1995 (AF 28-31), proposing to deny certification on the grounds that the requirement of two years experience without any educational requirement is unduly restrictive in violation of the regulations at 20 C.F.R. § 656.21(b)(2)(i)(A), because it excludes U.S. graduates of nursing schools who do not yet have two years experience. The CO also noted that according to the regulations at § 656.24(b)(2)(i) that U.S. workers will be considered able and qualified for the job opportunity if, by their education, training, experience or a combination thereof, is able to perform in a normally accepted manner. Accordingly, the CO also found that the Employer unlawfully rejected U.S. applicant Carmen Guillen, who is a licensed vocational nurse with two years of vocational training and nine months experience in violation of § 656.21(b)(6). The CO directed the Employer to document lawful, job-related reasons for its requirements and the rejection of Ms. Guillen.

Accordingly, the Employer was notified that it had until July 31, 1995, to rebut the findings or to cure the defects noted.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated July 19, 1995 (AF 11-27), the Employer contended that it had already considered the educational credentials of applicants, because although not specifically stated, to have a valid L.V.N. license in California, state regulations require an applicant for the license must ". . . have successfully completed the prescribed course of study in an accredited school of vocational nursing or have graduated from a school which, in the opinion of the Board, maintains and gives courses equivalent to the minimum requirements for an accredited school of vocational nursing in this state." The Employer also noted the requirement of two years experience falls within the SVP of the position in the *Dictionary of Occupational Titles* (DOT).

The CO issued the Final Determination on August 31, 1995 (AF 7-10), denying certification because the Employer did not adequately document that employers normally fail to consider combinations of education, training, and experience when considering whether an applicant is qualified. The CO noted that both education and experience are considered in the SVP (Specific Vocational Preparation) level of the DOT, and the Employer's argument excludes consideration of this preparatory education. The CO also noted that had the Employer listed an educational requirement on the application, in addition to the requirement of two years experience, the CO would have found in the NOF that the total educational and experience requirement was unduly restrictive as it exceeded the SVP level of the position. Accordingly, the CO found the Employer had not adequately documented that it rejected U.S. applicant Guillen for a lawful, job-related reason in violation of 20 C.F.R. §§ 656.21(b)(6) and (b)(2)(i).

On September 28, 1995, the Employer requested review of the denial of labor certification (AF 1-6). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

20 C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for the or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the U.S. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*); *Duarte Gallery, Inc.*, 88-INA-92 (Oct. 11, 1989).

In this case, the CO denied certification because the Employer did not have any educational requirements, but instead required a current California L.V.N. license and two years of experience, which the CO found unduly restrictive, and because the Employer rejected a U.S. applicant with at least 15 months of vocational training and nine months of experience. The Employer argues that because vocational training is required for the L.V.N. license, the educational requirement is implied, its requirement of two years experience is within the SVP level of the position, and Ms. Guillen was therefore rejected on a lawful, job-related basis.

The *Dictionary of Occupational Titles* lists the SVP for the position as 1-2 years. *See* DOT at 079.374-014. We agree with the CO that the SVP encompasses specific vocational training acquired in work or vocational training. Clearly, if the employer had required two years of vocational training and two years experience on the application, its requirements would have exceeded the SVP, and it would have to establish the business necessity of the excessive requirements. *See Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989)(*en banc*). Moreover, the Employer has not documented that its requirement of two years experience in additional to the required vocational training necessary to secure an L.V.N. license is normally required by employers seeking to fill such positions. Indeed, the Employer's rebuttal evidence provides copy of a page from the classified adds which shows 13 L.V.N. positions being offered that require one year of experience (AF 26). *See American Copper and Nickel Co., Inc.*, 87-INA-556 (1989).

Based on the foregoing, we find that the Employer's requirements of two years experience on addition to the vocational education required for an L.V.N. license is unduly restrictive. As the requirement of two years experience has been found to be excessive, rejection of any U.S. applicant solely for failure to possess that requirement is a rejection for other than lawful, job-related reasons in violation of §§ 656.21(b)(2)(i) and (b)(6).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of May 1998, for the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.